The Scope of Binding Arbitration Agreements in Contracts for Medical Services *Bolanos v. Khalatian*

I. INTRODUCTION

This Note presents a discussion of the effect of binding arbitration agreements in contracts for medical services and an analysis of whether these provisions should be held to bind nonsignators to such agreements. *Bolanos v. Khalatian*,[1] decided in June of 1991 by the second division of California's state appellate courts, presents a factual situation well suited to an analysis of binding arbitration agreements in medical service contracts and their effect on children of the signator, the signator's spouse, and the signator herself. This Note analyzes the conflicting reasoning of the California state appellate courts applied in determining the scope of arbitration agreements in medical service contracts. Also presented is the genesis of case law and policy that has given rise to a statute providing for the contractual binding to arbitration of claims arising out of the provision of medical services. In part, this paper is intended to provide an objective analysis of case law surrounding a specific example of tort reform enacted in the midst of the 1970's medical malpractice crisis. The present lull following the 1980's crisis affords an opportunity to examine the reasoning and effects of some of the legislative and judicial responses to the medical malpractice crises this nation periodically experiences.

Following the introduction, Part Two of this paper provides a brief economic and historical background to the enactment of the California binding arbitration statute. Part Three discusses the facts, procedural history, and resolution of *Bolanos v. Khalatian*. The plaintiffs in *Bolanos* are Ms. Bolanos, Mr. Bolanos, and their child, Tatiana. The claims of Ms. Bolanos and Tatiana are considered in light of current California law. Part Four separately considers Mr. Bolanos' claim and analyzes the reasoning behind the rules regarding the scope of arbitration agreements in California. Further, Part Four presents a summary of the arguments for and against the inclusion of nonsignator claims within the arbitration statute in conjunction with an appeal by the author that certain types of nonsignator claims not be subject to arbitration. The Conclusion suggests a legal and policy oriented method for determining whether to include nonsignator claims within the binding arbitration provisions in medical service contracts.

1. Bolanos v. Khalatian, 283 Cal. Rptr. 209 (Ct. App. 2d Dist. 1991).

II. ECONOMIC AND HISTORICAL BACKGROUND OF THE MEDICAL MALPRACTICE CRISES

A. The National Malpractice Crises

The United States has experienced a series of medical malpractice crises over the previous two decades which have generated responses from both the courts and the legislatures.[2] A cyclical pattern marked by recurring crises characterizes the medical malpractice insurance industry. During profitable periods, insurers are likely to write more policies, take greater risks, and compete for market share through competitive pricing. As the cycle continues, profit margins erode and losses increase as more competitors enter the market place and/or the existing insurers erode their own margins to capture greater market share. Eventually, the insurers respond by imposing greater discipline through restricting policy issuances, raising premiums, combining these responses, or exiting the marketplace. At this point a crisis of availability or affordability occurs. However, the actions taken by the insurers that result in the crisis also lead to a more profitable period, thus beginning the cycle once again.[3] The United States has experienced two major crises in recent history.

1. The Crisis of the 1970s

The relatively high likelihood of a physician being named a defendant in a malpractice suit is a fairly recent development. The American Medical Association (AMA) has estimated that as recently as the late 1950s only one doctor in seven faced a claim of malpractice during his or her entire career.[4] Policymakers first took note of the insurance coverage concerns of medical care providers in the late 1960s because the insurers and medical professionals voiced their distress over the rising frequency of claims and costs of insurance. The federal government took two steps to address the situation. Congress held hearings, and, in 1971, President Nixon directed the creation of a study commission. The investigation revealed no crisis.[5]

By 1974, however, a crisis in the malpractice system was clearly evident. The frequency of malpractice claims, which had risen moderately

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2. Randall Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989).

3. HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 2D SESS., MEDICAL MALPRACTICE, 49 (Comm. Print 1990).

4. Bovbjerg, *supra* note 2.

5. *Id.* at 502.

through the 1960s, turned sharply upward in the 1970s. Some of the reasons for this sharp upturn in the number of claims include developments in medical technology, increases in the degree of urbanization and in the number of physicians, and pro-plaintiff changes in legal doctrine adopted by the courts just prior to 1970.[6]

The crisis of the mid-1970s is frequently referred to as a crisis of insurance availability. A number of insurers decided to drop their malpractice business, leaving health care providers with few alternatives, if any, when choosing insurance coverage. The decrease in supply, coupled with a constant or increasing demand, resulted in dramatic premium increases, and created an affordability crisis.[7] Several major changes[8] resulted from the crisis of the 1970s, including the change from occurrence to claims-made malpractice policies, the creation of Joint Underwriting Associations (JUAs), and statutory arbitration provisions such as the one enacted in California.[9] Slower rates of growth in insurance premiums resulted from the changes implemented to combat the

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6. *Id.* at n.12.

7. HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 2D SESS., MEDICAL MALPRACTICE 49 (Comm. Print 1990).

8. The following is a discussion of some of the important developments. First, state legislatures or insurance commissioners began requiring insurers to report their experience with malpractice insurance separately from other lines of business. Second, Joint Underwriting Associations (JUA) were developed. The typical JUA is a state-overseen insurance pool in which all of the states's liability insurers are required to participate, but for which a single carrier conducts business much like a conventional company. Unlike a conventional insurer, however, a JUA has special statutory guarantees of solvency that enable it to accept all or nearly all applicants for coverage.

Third, and most significant to the insurers themselves, the system of writing insurance changed from occurrence-based to claims-made underwriting. This development was pioneered by the St. Paul Group, the leading commercial malpractice carrier. Traditional "occurrence" policies pay for any claim resulting from an occurrence in the policy year, no matter how long afterwards the claim is brought. These policies result in a long tail of hard-to-predict claims payments that continue for many years after the premiums are collected. "Claims-made" policies, as the name implies, cover only claims made during the policy year. Uncertainty about unreported, incurred claims is eliminated. While this helps rate projections, uncertainty still remains about how long it will take to settle cases and the cost of these cases. Today, "claims-made" coverage is almost universal even among physician-owned companies.

Fourth, many new "captive" insurance companies were created by groups of physicians or by medical and hospital associations to assure that their members would have continued coverage available regardless of the commercial profitability of malpractice insurance. Finally, many states adopted a variety of malpractice reform measures to limit the frequency and severity of malpractice claims such as arbitration requirements for medical malpractice claims. *See generally supra* note 2.

9. CAL. CIV. PROC. CODE § 1295 (West 1982).

mid-1970's crisis. Insurance companies once again began to compete for market share. A number of the insurers engaged in cash flow underwriting, pricing their malpractice premiums below actuarially indicated levels, and relying on the record high rates of investment returns available in the late 1970s to sustain these low premiums.

2. The Crisis of the 1980s

In the early 1980s, problems again arose in the malpractice insurance industry. This crisis was more one of affordability than of availability because the captive insurance companies formed during the 1970's crisis assured coverage availability. Although these insurers were committed to remaining in the market to provide coverage, their rates still rose rapidly.[10] The 1980's crisis differed from that of the 1970s in that it was more widespread, with the problems of non-medical insureds holding center stage. Municipalities, liquor stores, day care centers, and other seekers of liability insurance all found coverage expensive, if they could obtain it at all.[11] The 1980's crisis resulted in further adoption of liability reform proposals.[12]

Recently, discussion of malpractice reform has again surfaced at the federal level. The Bush Administration in particular advocated caps on damages and mandatory arbitration of malpractice claims, along with worker's compensation-style damage schedules. Withholding or granting a percentage of federal Medicare funds to the states, depending upon their compliance with the Administration's desires, would encourage these reforms.[13]

B. California's Response to the Malpractice Crisis of the 1970s

As a response to the medical malpractice crisis of the 1970s, Governor Edmund G. "Jerry" Brown of California convened a special session of the California legislature "to deal exclusively with the

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10. Richard Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 LAW & CONTEMP. PROBS. 37, 48 (Spring 1986).

11. Bovbjerg, *supra* note 2, at 503.

12. As the crisis was of broader scope than the 1970's crisis, these reforms often covered tort law generally and were not limited to medical liability. The main insurance reforms of the 1980s came at the federal level rather than in the states. Congress passed the Risk Retention Act in 1981 to assist insureds who sought products liability coverage. This statute allows insureds to come together and purchase group policies or to self-insure. In 1986 Congress expanded the statute to cover medical malpractice.

13. *See* I PUBLIC PAPERS 513 (May 15, 1991).

formulation of a legislative solution to the [malpractice] 'crisis.'"[14] The Governor requested that the legislature consider "[v]oluntary binding arbitration in order to quickly and fairly resolve malpractice claims while maintaining fair access to the courts."[15] This special session of the legislature passed the Medical Injury Compensation Reform Act (MICRA),[16] one part of which is § 1295 of the California Code of Civil Procedure.[17]

Section 1295 allows any contract for medical services to include a binding arbitration provision for any claims arising out of the delivery of medical services. Section 1295 specifically sets forth the format and wording necessary to comply with the statute.[18] The statute also provides that just before the signature line for the person seeking to contract for the medical services, the following must appear in at least 10-point bold red type: "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."[19]

Compliance with the statute has several benefits - the primary benefit being that any malpractice claims are submitted to arbitration and the physician avoids the stigma of a public trial. Another benefit is provided to the physician by subsection (e), which states that "such a [medical services] contract [providing for binding arbitration for all malpractice claims] is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with (a), (b), and (c) of this section."[20]

MICRA was intended to reduce the problems inherent in traditional medical malpractice litigation. Recent empirical studies have shown that the traditional tort system does not provide for the economic

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14. Gross v. James A. Recabaren, 253 Cal. Rptr. 820, 822 (Ct. App. 2d Dist. 1988) (citing 7 PAC. L.J. 545 (1976)). The crisis of the 1970s was a crisis of availability of malpractice coverage, as opposed to the affordability problems of the 1980s. For a complete discussion of the statutory responses to the malpractice crises see generally Bovbjerg, *supra* note 2, at 499.

15. *Gross*, 253 Cal. Rptr. at 822. (citing GOVERNOR'S PROCLAMATION TO LEG. (May 16, 1975), 10 Senate J. (1975-1976 2d Ex. Sess.) at 2).

16. Medical Injury Compensation Reform Act, chs. 1, 2, 9.1 Cal. Stat. § 1295 (1975).

17. CAL. CIV. PROC. CODE § 1295 (West 1982).

18. *Id.*

19. *Id.*

20. *Id.*

damages of the most severely injured patients.[21] At the same time the least severe injuries are often overcompensated.[22] Arbitration is seen as possibly providing a mechanism for more accurately determining adequate compensation while reducing the transaction costs inherent in traditional litigation.[23]

Another possible purpose behind the introduction of arbitration into the adjudication of medical malpractice claims is that an enormous amount of legitimate malpractice claims are never filed, perhaps due to the time and expense involved in traditional litigation.[24] Also, arbitration can be a less hostile environment for the settlement of disputes when the parties desire a continuing relationship.[25] However, it must be questioned whether the enactment of arbitration statutes, even binding ones, simply introduces another procedural step in the resolution of malpractice disputes, thereby increasing the time and expense involved in the resolution of claims.[26]

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21. Frank A. Sloan and Stephen van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131 (Winter 1991); Frank A. Sloan and Chee R. Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997 (1990).

22. Frank A. Sloan and Stephen van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131 (Winter 1991); Frank A. Sloan and Chee R. Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997 (1990).

23. *See generally* Catherine S. Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and Implementation*, 54 LAW & CONTEMP. PROBS. 195 (Winter 1991).

24. *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York*, THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF N.Y. (1990).

25. Meschievitz, *supra* note 23, at 198.

26. In the chart in Part IV(D), *infra*, eight cases are presented to show the development of case law regarding binding arbitration provisions in contracts for medical services. It is worth noting that the arbitration provision involved in each of these cases resulted in the additional procedural step of litigation to determine which parties the arbitration provision affected.

III. BOLANOS V. KHALATIAN

A. Factual Background and Procedural History

On October 5, 1988, Inez Chavez (Ms. Bolanos)[27] initially visited Dr. Khalatian for obstetric care and treatment when she was approximately twenty-five weeks pregnant.[28] During this initial visit, Ms. Chavez was provided a contract for medical services containing a provision for arbitration of all claims arising out of the medical services.[29] This provision was in compliance with §1295 of the California Code of Civil Procedure.[30] Ms. Chavez could not read English and was provided a Spanish version of the agreement which she signed and dated. Mr. Bolanos was unaware of the binding arbitration provision and was not a signator to the contract for medical services. From October 5, 1988, until the delivery of Tatiana Bolanos, Dr. Khalatian regularly checked the progress of Inez Chavez' pregnancy.[31] On December 16, 1988, Dr. Khalatian delivered Tatiana and allegedly, either shortly before or during delivery, injured Tatiana's arm.[32]

Mr. Bolanos, Inez Chavez, and Tatiana brought their separate claims in the Superior Court of Los Angeles County,[33] where Dr. Khalatian's motion to stay further proceedings and compel arbitration was denied.[34] The four causes of action brought in the lower court were identified by the court as:

i. Tatiana's claim for general negligence.
ii. Ms. Bolanos' claim for general negligence.
iii. Ms. Bolanos' claim for negligent infliction of

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27. The use of different last names by both parties is somewhat confusing. It is not clear from the opinion of the Appellate Court why Inez Chavez and Jose Bolanos are identified by different last names. The opinion does indicate that Jose Bolanos was also identified in the record as Jose Chavez. Regardless, Tatiana is identified as the daughter of Jose Bolanos and Inez Chavez. For the sake of consistency Inez Chavez/Bolanos will hereafter be identified as Ms. Bolanos.

28. *Bolanos*, 283 Cal. Rptr. at 210.

29. *Id.*

30. *Id.*

31. *See* Meschievitz, *supra* note 23.

32. *Bolanos*, 283 Cal. Rptr. at 210. The arm injured is not specified in the Appellate Court decision. However, from speaking to one of the defense attorneys involved in the trial portion of the case, it was discovered that the injury was to the child's right shoulder, it did not involve laceration, and Tatiana had fully recovered from her injuries.

33. *Id.* at 209.

34. *Id.* at 210.

emotional distress.

iv. Jose Bolanos' claims for negligent infliction of emotional distress.[35]

The Superior Court denied Dr. Khalatian's motion to compel arbitration, stating that it could not "say by a preponderance of the evidence or even a lower standard of convincing evidence that the waiver [of Ms. Bolanos' right to litigate] was executed in a knowing and intelligent fashion."[36] The court also stated that it "[could not] see how an agreement for arbitration can affect third parties" in regard to Mr. Bolanos and Tatiana. Dr. Khalatian then appealed the lower court's decision to the Second District of the California Court of Appeals, which held that the claims of all three persons were bound to arbitration.[37] An analysis of Ms. Bolanos' and Tatiana's claims, the appellate court's reasoning, and applicable law are discussed in the following section.

B. The Claims of Ms. Bolanos and Tatiana

The causes of action set forth by Ms. Bolanos are stated by the Second District of the California Court of Appeals as claims for "general negligence" and "negligent infliction of emotional distress."[38] It was clear to the court that her claims were bound by the arbitration agreement. Her declaration did not assert that she could not read or understand the agreement, only that she was able to read "only limited Spanish." Nor did Ms. Bolanos assert that she was duped into signing the agreement.[39] Ms. Bolanos did not enter into the agreement in an emergency, which could have made analysis under adhesion contract rules appropriate.[40] Both

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35. *Id.* at 209.

36. *Id.* at 211.

37. *Id.* at 212.

38. *Id.* at 210. *See supra* text accompanying note 35.

39. *Id.* at 211.

40. The *Bolanos* court states that "[t]here is no suggestion that her condition was such that she required immediate medical attention or that she involuntarily signed the documents in order to receive any urgent medical treatment." *Bolanos*, 283 Cal. Rptr. at 211, 212. This seems to suggests at least a possibility for a party, even the signator to the contract, to avoid the contract through a duress, undue influence, adhesion, or some similar claim. This appears at odds with the clear statutory language of § 1295(e), which states "[s]uch a contract is not a contract of adhesion, nor unconscionable *nor otherwise improper*, where it complies with subdivisions (a), (b), and (c) of this section."

However, subdivisions (a), (b), and (c) contain nothing which would prevent an arbitration agreement from being properly executed in compliance with the statute even in a situation where the services are immediately necessary and of an emergency nature as long as

§1295, with its terminology indicating that compliance with the statute renders the contract not one of adhesion, and case law establishing that one may not avoid a contract even where one did not read it,[41] clearly support binding Ms. Bolanos' claims to arbitration.

As to Tatiana's claim, precedent established by the California Supreme Court in *Doyle v. Giuliucci* appears to control her claim and bind it to arbitration.[42] In *Doyle*, April Doyle's father entered into a contract for medical services which provided for settlement by binding arbitration of any claim arising out of the provision of the services. April, through her father appointed as guardian *ad litem*, sought to pursue her medical malpractice claim in traditional litigation before the previously commenced arbitration could reach a decision.

The *Doyle* court identified the "crucial question" as "whether the power to enter into a contract for medical care that binds the child to arbitrate any dispute arising thereunder is implicit in a parent's right and duty to provide for the care of his child."[43] In holding that it was an implicit parental power for parents to bind their minor children in this manner, the court reasoned that minors might not otherwise be able to obtain health care. Because minors have the power to disaffirm their contracts to pay for medical services,[44] the court considered it unlikely that medical groups would contract with minors.[45] In rendering its decision, the California Supreme Court listed what it considered to be "commensurate safeguards" on the parental power: "(i) that the issues not be compromised but simply adjudicated by the arbitrators, (ii) that a guardian *ad litem* must conduct the proceedings on behalf of the child, and (iii) that both the issue of arbitrability and the award, if any, be subject to judicial review."[46] Tatiana's claim appears to be clearly confined to binding arbitration under current California law.[47]

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the agreement is signed by the party to be bound.

41. *Bolanos*, 283 Cal. Rptr. at 211 (citing Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315 (Ct. App. 1986)); Madden v. Kaiser Foundation Hospitals, 710 Cal. Rptr. 882 (1976).

42. Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965).

43. *Id.* at 3.

44. CAL. CIV. CODE §§ 35, 36 (West 1982).

45. *Doyle*, 401 P.2d at 3.

46. *Id.*

47. *See* 6 CAL. JUR. 3D *Arbitration and Award* § 9 (1988) for a discussion of the effect of binding arbitration agreements on children and a brief note on *Doyle*.

IV. MR. BOLANOS' CLAIM AND THE DEVELOPMENT OF LAW IN CALIFORNIA

A. Introduction

This section analyzes the process by which, given a variety of factual situations, the California appellate courts have arrived at different outcomes when addressing the issue of whether nonsignators to a contract should be bound by binding arbitration clauses. The holding of the *Bolanos* court will be discussed, the origins of its reasoning explored, and the conflicting opinions of other California appellate opinions presented. In discussing the genesis and development of the binding arbitration doctrine of *Bolanos*, it is necessary to provide a brief summary of many of the cases on which the *Bolanos* and other California appellate courts rely. In addition to an examination of the opinions and the development of reasoning surrounding this issue, a summary table is included at the end of this section to provide an overview of the developments in the law. First, however, it is necessary to examine the disposition of Mr. Bolanos' claim.

B. The Bolanos Court

As stated above, the appellate court found that Mr. Bolanos' claim for negligent infliction of emotional distress was bound to arbitration along with all other claims in the dispute.[48] The court considered it clear from the language of the contract that "*all* parties whose claims arise out of or are related to the treatment provided to [Ms. Bolanos] were to be submitted to binding arbitration."[49] The court then identified the controversy, the very heart of this Note, as whether an arbitration agreement can be applied to a person who is not a signatory to the agreement.[50] Referring to its holding in *Gross v. Recabaren*,[51] the court restated its belief that where a patient expressly contracts to submit to arbitration any dispute of medical malpractice, and the agreement fully complies with §1295, then "*all* medical malpractice claims arising out of the services contracted for, regardless of whether they are asserted by the

48. At trial, a factual dispute existed over whether Mr. Bolanos was actually present during the injury producing event. As the lower court decided the issue of arbitrability, and no factual determination was made as to an element of the dispute, the appeals court was justified in taking this existing claim and determining its arbitrability regardless of a lack of factual determination, a subject appropriately left to the fact-finder. *See supra* note 32.

49. *Bolanos*, 283 Cal. Rptr. at 212 (emphasis in original).

50. *Id.*

51. *Gross*, 253 Cal. Rptr. at 820.

patient or a third party" are bound to arbitration.[52]

C. *The Split in Authority*

In order to understand the basis of the reasoning from which the *Gross* and *Bolanos* holdings derive, it is necessary to examine their foundations. In the *Gross* case, Division Two, Second District of the California Court of Appeals, explicitly recognized a split in California appellate authority concerning the legitimacy of applying binding arbitration agreements to nonsignator third parties. Two cases represent this split: *Baker v. Birnbaum*[53] and *Herbert v. Superior Court*,[54] decided by Divisions Four and Five, respectively, of the Second District, California Court of Appeals.

In *Herbert*, the Fifth Appellate Division bound all parties, including three adult children of the decedent, to arbitration of their wrongful death claim. The three adult children were neither members of the family's group health plan, nor signatories to the health plan agreement, which included a binding arbitration provision.[55] In *Baker*, the Fourth Division recognized the *Doyle* and *Hawkins* cases mentioned in *Herbert*, but held that a spouse who had signed an agreement to arbitrate any dispute as to medical malpractice had not bound her nonsignatory spouse when the services for which she contracted were *for herself only*.[56] The *Gross* court decided, based upon the arguments presented in the above cases, that *Herbert* provides the better rule. *Bolanos* was thus an extension of the doctrine adopted by the court in *Gross*. The split in authority is now evident, with Divisions Two and Five binding the nonsignator third parties, while Division Four does not bind persons who are not parties to the contract.

1. *Herbert v. Superior Court*

In order to understand the reasoning applied in *Gross*, it is necessary to examine the *Herbert* case from which *Gross* adopted its reasoning. *Herbert* was an action for wrongful death, brought by five minor children of the decedent, the decedent's spouse, and three adult,

52. *Bolanos*, 283 Cal. Rptr. at 212 (emphasis in original).

53. 248 Cal. Rptr. 336 (Ct. App. 2d Dist. 1988).

54. 215 Cal. Rptr. 477 (Ct. App. 2d Dist. 1985).

55. *Id.*

56. Gross v. Recabaren, 253 Cal. Rptr. 820, 826 (Ct. App. 2d Dist. 1988) (citing Baker v. Birnbaum, 248 Cal. Rptr. 336 (Ct. App. 2d Dist. 1988)).

nonsignator children of the decedent. The health insurance contract in *Herbert*, signed by the decedent, included a provision requiring "arbitration of any claim asserted by a member, or a member's heir or personal representative, arising from the rendition or failure to render services under the agreement, irrespective of the legal theory upon which the claim was asserted."[57] The *Herbert* court considered the wrongful death claim of Ms. Herbert and the five children therein to be governed by *Hawkins v. Superior Court* and *Doyle v. Giuliucci*, which clearly establish that a parent can bind a minor child in an agreement for medical services.[58]

The court in *Herbert* also considered the issue of whether the arbitration provision of the insurance plan agreement should be binding upon adult heirs who were not members of the plan. The analysis of this issue, which created the rule applied subsequently in *Gross* and *Bolanos* to nonsignatory third parties, was arrived at by considering the following case law and policy:[59]

(a) The California Supreme Court's ruling in *Madden v. Kaiser Foundation Hospitals;*[60]
(b) *Mayerhoff v. Kaiser Foundation Health Plan, Inc.*,[61] a case which established a wrongful death claim as a single cause of action;
(c) the policy recognized in *Hawkins* favoring arbitration and *Hawkins'* allowance of spouse binding spouse;
(d) *Doyle's* binding of a minor child's claim;
(e) "railroad pass" cases which allowed a decedent to bind his heirs without their knowledge;
(f) the fact that it would be unrealistic to have all the heirs as signators to the health care service agreement;[62]
(g) other considerations, including §1295, which "evidence a legislative

57. *Herbert*, 215 Cal. Rptr. at 478.

58. Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965).

59. The discussion presented by the court in *Gross* was not presented in the order shown here. The purpose of presenting the court's analysis in this order is to indicate a combination of what the author perceives the court was most persuaded by and a chronological development of the case law. Note that the discussion of *Doyle*, a 1965 case, comes after the discussion of *Madden*, a case decided in 1976, and *Hawkins*, decided in 1979. This order is chosen because the facts of *Herbert* lead the court to rely more on *Madden* and *Hawkins* than on *Doyle*. The summary at the end of this section provides a chronological development of the law in regards to the third party binding issue.

60. 131 Cal. Rptr. 882 (1976).

61. 138 Cal. Rptr. 319 (Ct. App. 1977).

62. *Herbert*, 215 Cal. Rptr. at 481.

intent that a patient who signs an arbitration agreement may bind his heirs to that agreement, regardless of whether the heirs are also members of the plan."[63]

a. Madden v. Kaiser Foundation Hospitals

The first step in *Herbert*, leading to the development of the *Bolanos* rule, was to consider the California Supreme Court's decision in *Madden v. Kaiser Foundation Hospitals*.[64] In *Madden*, the State Employees' Retirement System Board of Administration entered into a medical services contract with Kaiser Foundation Health Plan containing an arbitration clause for claims arising out of the provision of services. Plaintiff contended that her medical malpractice claim was not bound by the arbitration clause because the contract was one of adhesion and it denied her constitutional right to a trial by jury.[65] The California Supreme Court rejected the adhesion contract argument by noting that it was applicable only where the parties are of unequal bargaining power, and the stronger party has taken advantage of the weaker party.[66] Here, no adhesion contract existed because of the parity in bargaining power between Kaiser and the Employees' Retirement System. The court then dealt with the deprivation of trial by jury argument:

> We shall reject, finally, plaintiff's contention that the arbitration provision violates constitutional and statutory provisions protecting the right to trial by jury. Persons entering into arbitration agreements *know* and *intend* that disputes arising under such agreements will be resolved by arbitration, not by juries; neither decision nor policy calls for an explicit waiver of the parties' right to jury trial or for express conformance with . . . the applicable procedural statute.[67]

Here, the plaintiff was bound to the terms of the contract because the Employees' Retirement Board was seen as a fiduciary of the plaintiff. The court concluded that an agent or other fiduciary contracting on behalf of his beneficiary, here the plaintiff, retains the authority to enter into an

63. *Id.* at 477.

64. *Id.* at 479.

65. *Madden*, 131 Cal. Rptr. at 884.

66. *Id.* at 890.

67. *Id.* at 884 (emphasis added).

agreement providing for arbitration of medical malpractice claims.[68] While it appears the California Supreme Court based its decision in part on the principal-agent relationship existing between the party contracting and the party bound (a relationship which does not appear to exist in *Bolanos*), other statements by the court provide evidence of the court's attitude toward arbitration and its application to third parties.

In *Madden*, the court states, in response to amicus' request for a rule requiring *actual* knowledge of the arbitration agreement in order for it to be applicable, that such a rule "would be viable only if arbitration were an extraordinary procedure, and one especially disadvantageous for the beneficiary - propositions which we have rejected in *Doyle* and other cases . . . ."[69] While this response, along with other statements by the court, refers to a situation where the contracting party was considered the agent of the bound party, it indicates that the court does not consider arbitration to be substantially disadvantageous to the party bound.[70] The question that remains after *Madden* is whether a third party may be bound to an arbitration provision in a contract for medical services, where the contracting party is not an agent or fiduciary of the party to be bound. This Note considers it especially important that the court, in rejecting the plaintiff's arguments, stated that plaintiff *benefitted* from the board's assertion of equal power on her behalf, *enjoyed the opportunity to choose* and *waived no substantive right*.[71]

b. Mayerhoff v. Kaiser Foundation Health Plan, Inc.

In *Mayerhoff*, the cause of action, like that in *Herbert*, was one for wrongful death.[72] *Mayerhoff* clearly established that a single cause of action exists in the heirs for the wrongful death of a decedent.[73] One way to view a wrongful death action is that the claim for wrongful death is a derivative claim, created by statute, which belongs to the decedent, and is passed to his or her heirs because of the decedent's inability to bring the

68. *Id.* at 888 n.11. The court was also likely persuaded to decide in this manner because the plaintiff, like all persons covered by this medical services plan, received a brochure from Kaiser which described the plan, including the arbitration provision, thus providing plaintiff with actual knowledge of the arbitration provision.

69. *Id.*

70. In proving its point, the Court states that plaintiffs' recitation of authority holding arbitration provisions to be an extraordinary method of resolving disputes comes only from states other than California. *Id.* at 887.

71. *Id.* at 890.

72. *Mayerhoff*, 138 Cal. Rptr. 319.

73. *Id.*

action.[74] The court in *Herbert* expresses this notion by stating that "[a]lthough wrongful death is technically a separate statutory cause of action in the heirs, it is in a practical sense derivative of a cause of action in the deceased."[75] Thus, the court in *Herbert*, which involved a wrongful death claim, considered the nature of the claim to be a single cause of action prohibiting the "splitting of the litigation into different tribunals where differing rulings and results could destroy the Legislature's policy [as announced] in *Mayerhoff*."[76]

It would appear that identical reasoning is not applicable to *Bolanos*. Mr. Bolanos asserts a claim for emotional distress, a separate cause of action from the negligence claims brought by Ms. Bolanos and Tatiana. Although the plaintiffs' claims do arise out of the alleged negligence during the provision of medical services, no legislative policy or judicial reasoning makes these claims inseparable.

Mr. Bolanos' claim is governed by *Thing v. LaChusa*,[77] a case which developed the *Dillon v. Legg*[78] rule for recovery in emotional distress actions. Both *Dillon* and its refinement in *Thing* require that there be a close relationship between the physically injured party and the person asserting the emotional distress claim. Although neither case refers to the claims of the physically injured party and the person asserting the emotional distress claim as inseparable, it would seem duplicative and a waste of judicial resources to have separate determinations of negligence which could lead to inconsistent rulings on the same issues.

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74. The common law recognizes no action for wrongful death. However, subsequent to the passage of Lord Campbell's Act by the British Parliament, all American states have now statutorily created a right to recovery for wrongful death.

Generally three types of wrongful death provisions exist. One allows recovery for the economic benefit the survivors would have derived had the decedent lived. Another allows an amount recoverable based upon the gravity of the defendant's fault. The third treats recovery as if it were an asset of the decedent distributed to the survivors upon death. 22 AM. JUR. 2d § 7 (1991).

75. *Herbert*, 215 Cal. Rptr. at 481. Every state has adopted a wrongful death statute. These statutes supersede the common law rule which extinguishes a civil cause of action upon the death of the party. Wrongful death statutes provide for the heirs, administrator, or executor to recover the economic benefit that the heirs would have received had the decedent lived. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 127 (5th ed. 1984).

76. *Herbert*, 215 Cal. Rptr. at 481.

77. 257 Cal. Rptr. 865 (1989).

78. 69 Cal. Rptr. 72 (1968).

c. Hawkins v. Superior Court

Following its discussion of *Madden*, Division Five, of the Second District Court in *Herbert* then acknowledged that a strong judicial and public policy exists favoring arbitration over litigation as a means of settling disputes.[79] Notably, this policy has been recognized and extended to wrongful death actions in *Hawkins v. Superior Court*,[80] and by the California legislature.[81]

The *Hawkins* case established that spouses have the ability to enter into health services contracts for one another as a result of their fiduciary relationship[82] and their mutual obligations of care and support.[83] This mutual obligation of care includes the obligation of medical care.[84] The Fourth District in *Hawkins* reasoned that since spouses have the power to contract for medical services for one another as a result of their relationship and mutual obligations, "implicit in that power is the implied authority to agree for [one another] to arbitrate claims arising out of medical malpractice."[85]

d. Doyle v. Giuliucci

Although it does not pertain directly to the situation involved in *Herbert*, the court mentioned the *Doyle*[86] case in order to provide precedent for binding the minor children involved in *Herbert* to arbitration. Further, *Doyle* is used to illustrate another situation in which a party to a contract can bind a third party nonsignator to the terms of the agreement.

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79. *Herbert*, 215 Cal. Rptr. at 480.

80. 152 Cal. Rptr. 491 (Ct. App. 4th Dist. 1979).

81. CAL. CIV. PROC. CODE, §§ 1283.1, 1295 (West 1982).

82. The idea of a fiduciary relationship existing between spouses is well recognized and discussed in In re Cover's Estate, 204 P. 583 (Cal. 1922); Dolliver v. Dolliver, 30 P. 4 (Cal. 1892); O'Neil v. Spillane, 119 Cal. Rptr. 245 (Ct. App. 1975); Steiner v. Steiner, 325 P.2d 109 (Cal. Ct. App. 1958); Auclair v. Auclair, 165 P.2d 527 (Cal. Ct. App. 1946), and discussed in 6 WITKIN, SUMMARY OF CALIFORNIA LAW § 4, pp. 4877-4878 (1974).

83. *Hawkins*, 152 Cal. Rptr. at 495.

84. *Id.* (citing Sanderson v. Niemann, 110 P.2d 1025 (Cal. 1941) and Louie v. Hagstrom's Food Stores, 184 P.2d 708 (Cal. Ct. App. 1st Dist. 1947)).

85. *Id.*

86. *See supra* note 41 and accompanying text.

e. The Railroad Pass Cases

In order to support its decision to bind the spouse and children of the deceased to the binding arbitration clause, the *Herbert* court mentioned "some instances" where a decedent may limit or bar certain types of claims through contract. The cases cited, as the court points out, are what are known as "railroad pass cases."[87] In these cases a holder of a railroad pass would agree, as part of the exchange for the pass, to waive any possible claims against the railroad. Courts held this waiver to bind the heirs of the decedent in actions for wrongful death.[88]

Although an analysis of limitations placed by a decedent or post-death claims is applicable to *Herbert*, an action for wrongful death, such an analysis should not apply to *Bolanos*, where both the party to the contract and the nonsignator are alive when the claim is to be pursued. A wrongful death claim, although statutory, may be considered to be derivative of the decedent's claim. Reasoning that would bind such a wrongful death claim would not necessarily apply to a separate claim for emotional distress when the signator's claim is one for negligence resulting in medical malpractice.

f. Practical Considerations

Two practical considerations are advanced by the court in *Herbert* concerning the binding of nonsignators to arbitration for claims arising out of a contract for medical services. First, the court considers it impractical to require the signatures of the heirs of decedent because they are unidentifiable until the time of death, and they are not likely to be readily available if they could be ascertained. Second, the court is concerned that were the potential heirs' signatures required, it would be poor policy to allow third parties to delay medical treatment to the party in need merely because of their refusal to sign the agreement. Although the ascertainability problem is unique to a wrongful death case, the availability and willingness issues are valid when applied to a case such as *Bolanos*. However, these practical considerations beg the very question of whether a nonsignatory third party should be bound without his or her knowledge or consent in any form. Certainly, if actual notice were suggested as an alternative these considerations would be valid. The issue is not one of

87. *Herbert*, 215 Cal. Rptr. at 481.

88. *Id.* at 481 n.3 (citing Francis v. Southern Pacific Co., 333 U.S. 445 (1948); Northern Pac. Ry. Co. v. Adams, 192 U.S. 440 (1904); Mehegan v. Boyne City G. & A.R. Co., 141 N.W. 905 (Mich. 1913); Perry v. Philadelphia, B. & W.R. Co. 77 A. 725 (Del. Super. Ct. 1910); Griswold v. New York & N.E.R. Co., 4 A. 261 (Conn. 1885).

whether actual notice is a necessity in order to bind parties not receiving medical services. Indeed, if actual notice were provided to these parties, there would be no argument over whether they were bound. The issue is whether third parties should be bound *without* knowledge or notice of the arbitration provision, or as in *Bolanos*, without knowledge of the contract itself. Thus, these considerations are validly entertained if a decision is made not to bind nonsignators to the medical services agreement, absent actual notice.

One method of avoiding these concerns is simply to bind only those parties with notice of the agreement. Those who are not aware of the agreement would not be bound. Under such a rule, Mr. Bolanos would be able to pursue his claim in traditional litigation, while his wife and child would be bound to arbitration. To hold otherwise is to allow a nonsignator, indeed someone wholly unaware of the contract provisions, to be deprived of the right to a jury trial and the ability to bring an action in traditional litigation.[89] The notion of freedom of contract allows parties of equal bargaining power to agree to the terms of their transactions. The converse, freedom from being bound by terms to which one does not agree, is also forfeited by the *Bolanos* reasoning.

However, those who would share in the benefits of a transaction must also experience some of the costs. In *Doyle* and *Hawkins* the parties who did not wish to be bound by the arbitration agreement, the child and wife, both received direct benefit from the medical services contract which contained the arbitration agreement. April Doyle was the direct recipient of the medical services, and Ms. Hawkins was provided health services under the insurance contract along with her husband. This direct benefit argument will be developed further in the subsequent section and in the

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89. In reasoning that it would be impractical and unreasonable to allow one party to deny another access to medical services merely due to their lack of consent, the *Gross* court states that "it would be impermissible to adopt a rule . . . that would permit one spouse to exercise a type of veto power over the other's decision." *Gross*, 253 Cal. Rptr. at 827 (Ct. App. 2d Dist. 1988). However, this is exactly what happens to the nonsignator when he or she is either unaware or does not consent to the provisions of the contract and the signator "vetoes" some of the rights, and the courts uphold this ability.

It must be remembered that when the court states that one party would exercise a veto power over the other's ability to obtain medical services, it is only due to the health care provider's unwillingness to provide these services absent concessions from the patient and other parties. Under the *Gross* and *Bolanos* decisions the power of the health care provider to reject service absent these concessions, a right undisputed here, is held to be more important than the third parties' right to be free from limitations on their ability and on the forum in which claims may be pursued. If this balancing were done with the proviso that the third party must be a beneficiary of the services, this note would agree that an appropriate balancing has been achieved. However, this has not been achieved in cases such as *Hawkins*, as will be seen in the subsequent sections.

analysis of Division Four's decisions in *Baker* and *Rhodes v. California Hospital Medical Center*.[90]

g. Other Considerations

The *Herbert* court rejects the plaintiff's contention that the arbitration provision violates the constitutional and statutory provisions protecting the right to jury trial by stating that "neither decision nor policy calls for an explicit waiver of the parties' right to jury trial . . . ."[91] However, in *Madden* and *Herbert*, the parties bound to the agreement both received direct benefit from the health care contracts. In *Herbert*, the plaintiff's husband was a Teamster, and the union obtained the contract for coverage of its union members and their families. The *Herbert* court cites §1295 of the California Civil Code as recognizing arbitration as a forum for handling wrongful death claims.[92] Although it cites §1295, it is only from an annotation to *Hawkins* that this section provides insight into how wrongful death cases should be decided. Although wrongful death actions may be very appropriately brought and resolved in an arbitration forum, it is important to realize that *Bolanos* did not involve a wrongful death claim, although the *Bolanos* court adopted the *Gross* and *Herbert* decisions, which include just such a wrongful death argument.

2. Baker v. Birnbaum

Now that the approach of Divisions Two and Five in regard to the issue of binding nonsignators has been addressed, it is necessary to examine Division Four's reasoning. In *Gross*, Division Two identified *Baker* as the point at which the California courts of appeal split in their decisions pertaining to the binding of nonsignator claims to arbitration. In *Baker*, the nonsignator spouse's claim was not bound by the binding arbitration agreement in the contract for medical services.[93]

Baker involved a claim by a husband for loss of consortium due to injuries his wife sustained as a result of Dr. Birnbaum's alleged negligence during a breast implant removal.[94] The issue facing Division Four of District Two was "whether a spouse who signs an agreement to

90. Rhodes v. California Hosp. Medical Ctr., 143 Cal. Rptr. 59 (Ct. App. 2d Dist. 1978).

91. *Herbert*, 215 Cal. Rptr. at 480 (citing Madden v. Kaiser Found. Hosps. 131 Cal. Rptr. 882 (1976)).

92. *Herbert*, 215 Cal. Rptr. at 480.

93. Baker v. Birnbaum, 248 Cal. Rptr. 336 (Ct. App. 2d Dist. 1988).

94. *Id.*

arbitrate her medical malpractice claims thereby binds a nonsignatory spouse to arbitration when the medical services for which the signatory spouse contracted were for herself only."[95] The court considered *Baker* to be governed by its decision in *Rhodes v. California Hospital Medical Center*,[96] which held that the policy favoring arbitration does not extend to persons who are neither parties to the contract nor have authorized someone to contract on their behalf.[97]

In support of this decision, the court cited *Wheeler v. St. Joseph Hospital*, which held that "[a] party cannot be compelled to arbitrate a dispute he has not agreed to submit."[98] *Wheeler* derives its support for this position from the U.S. Supreme Court's decision in *United Steelworkers of America v. Warrior & Gulf Navigation Co.* and the California Supreme Court's decision in *Freeman v. State Farm Mutual Automobile Ins. Co.*, both of which indicate that a party should not be bound to arbitration unless he or she agrees to be bound.[99]

In *Baker*, the appellant, Dr. Birnbaum, relies directly on *Hawkins* as a controlling case. The court in *Baker* distinguishes between the situation in *Hawkins* and the one before it, by showing that *Hawkins* considered its facts "equal" to those of *Madden*, where the husband was empowered to contract for his wife. Conversely, the facts in *Baker* show that the wife contracted for the services "solely on her own behalf."[100] In fact, *Hawkins* itself distinguishes *Rhodes* (and therefore *Baker*) on the basis that *Rhodes* involved an individual contract and not a group health plan.[101] It seems appropriate at this point to inject the statement of the California Supreme Court in *Madden* that "[p]ersons entering into arbitration agreements *know* and *intend* that disputes arising under such agreements will be resolved by arbitration . . . ."[102] Even considering this language, *Madden* involved an employee who received a benefit,

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95. *Id.* at 337.

96. Rhodes v. California Hosp. Medical Ctr., 143 Cal. Rptr. 59 (Ct. App. 2d Dist. 1978).

97. *Id.*

98. Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 782 (Ct. App. 1976).

99. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960); Freeman v. State Farm Mut. Auto. Ins. Co., 121 Cal. Rptr. 477 (1975).

100. Baker v. Birnbaum, 248 Cal. Rptr. 336, 337 (Ct. App. 2d Dist. 1988).

101. In *Hawkins*, the court explicitly stated that "we cannot agree with petitioner's contention that *Rhodes* is 'on all fours' with the case at bench. *Rhodes* involved an individual patient contracting for medical services for herself whereas in the instant case the husband contracted for health care services *for himself and his wife.*" *Hawkins*, 152 Cal. Rptr. at 494 (emphasis added).

102. *Madden*, 131 Cal. Rptr. at 884 (emphasis added).

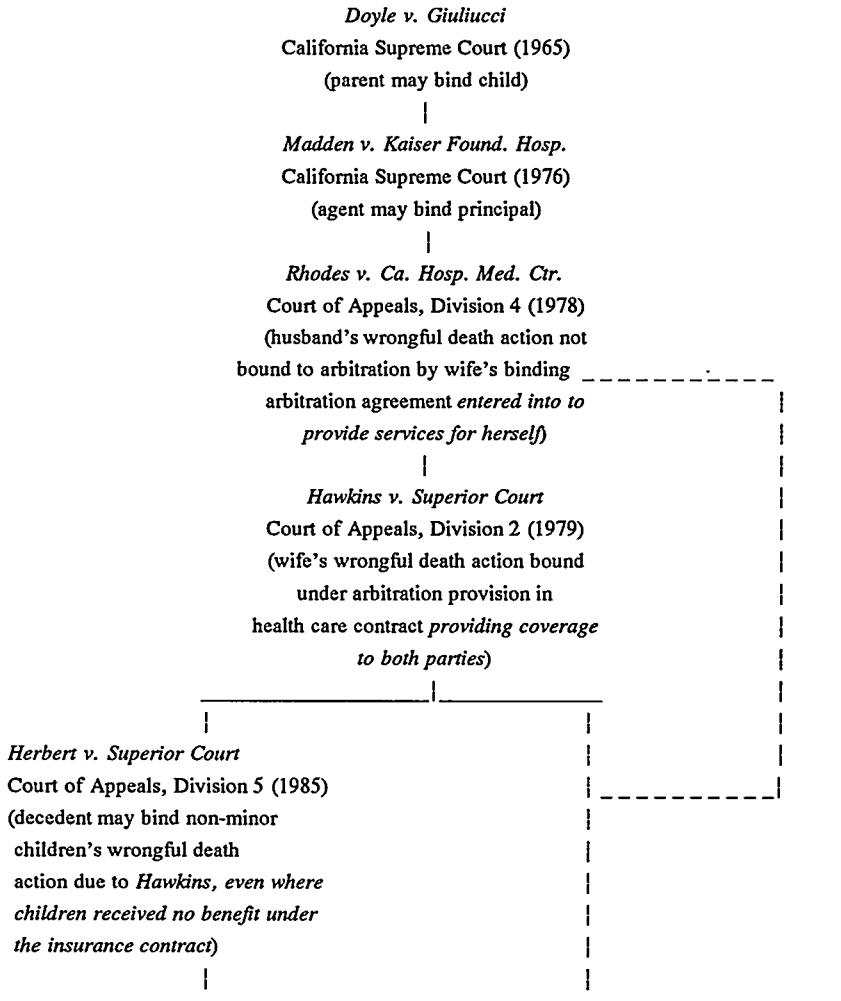
health insurance, when her agent, the union, obtained coverage for her while contracting with the Kaiser Health Plan.

The key factor which separates the reasoning of the Fourth Division in *Rhodes* and *Baker,* from *Madden* and *Hawkins,* appears to be whether the direct benefit of the contract is to be received by the signator alone, or by both the signator and the nonsignator. Those who are to benefit directly from the contract, such as the child in *Doyle,* should bear the cost of being bound by the arbitration provision. Those who receive no direct benefit (i.e., medical services), such as the adult children in *Herbert* or Mr. Bolanos, should not bear the cost of being bound by an arbitration agreement of which they have no knowledge. In *Madden* and *Hawkins,* the bound parties received direct benefit, health care coverage, from the health care insurance contracts containing the arbitration agreement. In *Rhodes* and *Baker,* the nonsignators received no such direct benefit; rather they received an indirect benefit, the care provided to their spouses.

Apparently, the Fifth Division of the California Court of Appeals declines to recognize the distinction made in *Rhodes* and *Baker.* Division Two in *Gross,* and subsequently *Bolanos,* bound parties who did not receive a direct benefit from the contracts involved in those cases. In doing so, Division Two improperly relied on the *Hawkins* opinion. *Hawkins* expressly distinguished itself from *Rhodes* because *Rhodes* contained facts very similar to *Gross* and *Bolanos,* namely that the signators were obtaining health services solely for themselves. It appears that the Second and Fifth Divisions have decided to rely on the rule established by Division Five in *Herbert,* rather than follow *Baker* and recognize *Hawkins'* valid distinction. Further, the *Hawkins* distinction appears to be required considering the California Supreme Court's discussion in *Madden.* Again, *Hawkins,* the case upon which Divisions Two and Five place so much reliance, specifically distinguishes itself from facts very similar to those arising in the cases that subsequently rely upon it.

D. An Overview of the Case Law Development

The following diagram is provided to summarize the preceding discussion.


Doyle v. Giuliucci
California Supreme Court (1965)
(parent may bind child)
Madden v. Kaiser Found. Hosp.
California Supreme Court (1976)
(agent may bind principal)
Rhodes v. Ca. Hosp. Med. Ctr.
Court of Appeals, Division 4 (1978)
(husband's wrongful death action not bound to arbitration by wife's binding arbitration agreement *entered into to provide services for herself)*
Hawkins v. Superior Court
Court of Appeals, Division 2 (1979)
(wife's wrongful death action bound under arbitration provision in health care contract *providing coverage to both parties)*
Herbert v. Superior Court
Court of Appeals, Division 5 (1985)
(decedent may bind non-minor children's wrongful death action due to *Hawkins, even where children received no benefit under the insurance contract)*
Gross v. Recabaren, M.D.
Court of Appeals, Division 2 (1988)
(adopts *Herbert* as the appropriate rule and binds wife's loss of consortium claim *where husband entered into contract with physician for services only for himself)*
Baker v. Birnbaum
Court of Appeals, Division 4 (1988)
(applies *Rhodes* to allow husband to pursue loss of consortium claim in traditional litigation where his wife contracted for medical services *for herself only)*
Bolanos v. Khalatian, M.D.
Court of Appeals, Division 2 (1991) (applies *Gross* to bind husband's emotional distress claim arising from medical services provided under contract containing binding arbitration provision *entered into solely by wife)*

E. The Appropriate Test

As can be seen from the preceding discussion and diagram of the evolution of cases, the Fifth Division departed from apparently sound reasoning when it misapplied *Hawkins* to bind persons who receive no direct benefit from a health services contract to the terms therein. When *Hawkins* explicitly distinguishes itself from a *Rhodes*-like situation where the signator contracted for services solely for him or herself, it can only be suspected that Divisions Two and Five are taking into account other reasons for binding the parties involved.

Neither division identifies this apparent misapplication of *Hawkins*. However, it is possible that the overriding concern that health care providers be able to obtain medical malpractice insurance, combined with the concern that persons be able to obtain services from these caregivers (who are under no initial obligation to provide such care), has led these divisions to apply binding arbitration agreements to third parties in order to further the availability of care and malpractice coverage.

It appears necessary, however, to explicitly consider the interests at stake, when outcomes such as those reached by Divisions Two and Five are apparently evolving into doctrine. The two divisions appear to be balancing two different interests. On one side are the nonsignator's constitutional right to jury trial, and the general "freedom of contract" idea that those not parties to a contract are not bound by its terms. On the other side are MICRA's policy of controlling costs for physicians' malpractice premiums enacted in the midst of a malpractice "crisis" and the questionable idea that people are more quickly and more adequately compensated in arbitration proceedings.

Empirical evidence has only recently become available concerning the effectiveness of many of the tort reforms enacted during the 1970s and 1980s. For this reason, courts should hesitate to expand a doctrine which deprives parties of both constitutional and contractual rights under the banner of furthering the policies of these reforms. When presented with the divergence in opinion apparent in the California appellate courts, the wise choice is to choose that doctrine which has developed *consistently* from precedent containing non-distinguishable factual situations. The Fourth Division's *Rhodes* doctrine provides the basic rule.

As developed by this Note, the rule could be presented as follows. If any of the following criteria are met, the nonsignator to the contract is bound: (1) If the nonsignator is in a principal-agent or in another fiduciary relationship with the signator party where the relationship exists for the purpose of entering into agreements for medical

services;[103] or (2) where the nonsignator receives a direct benefit from the contract for health services, such as the delivery of medical care to him or herself, as in the case of children or an incapacitated individual,[104] or receives health insurance coverage, as where spouses provide each other with medical insurance.[105] Otherwise, the general rule that persons not parties to a contract are not bound by its terms would apply.[106]

V. CONCLUSION

We are in a lull between the medical malpractice "crises" which have given rise to the legislation and responses by health care providers discussed herein. In fashioning a judicial rule to apply to legislation authorizing binding arbitration agreements in contracts for medical services, it is possible to have a profound effect on the legislation's impact. In considering the cost containment goals the legislation is meant to achieve, other goals - those of our civil justice system - must also be examined. While we are in this lull, we possess valuable time for rational, objective consideration of the interests at stake when we consider binding persons to contract terms of which they are unaware. The foregoing discussion attempts to provide such objective analysis, and the rule discussed seeks to achieve the twin goals of protecting the individual while giving effect to rational, necessary legislation.

David M. Ward

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103. *Id.*

104. Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965).

105. *Hawkins*, 152 Cal. Rptr. at 491.

106. Rhodes v. California Hosp. Medical Ctr., 143 Cal. Rptr. 59, at 61 (Ct. App. 2d Dist. 1978); Baker v. Birnbaum, 248 Cal. Rptr. 336 (Ct. App. 2d Dist. 1988).